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STATUTES

CASES

40424—25——1

In the Supreme Court of the United States

OCTOBER TERM, 1924

THE STATE OF COLORADO, APPELLANT
v.
ROGER W. TOLL, SUPERINTENDENT OF THE Rocky Mountain National Park
No. 234

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO

BRIEF FOR APPELLEE

STATEMENT

By the Act of January 26, 1915, c. 19, 38 Stat. 798 (U. S. Comp. Stat. 1916, sec. 5249 a–d), certain lands in Colorado were reserved and withdrawn from settlement, occupancy, or disposal under the laws of the United States and were set aside as a public park and designated the Rocky Mountain National Park. Other lands were subsequently added to the park by the Act of February 14, 1917 (c. 61, 39 Stat. 916; U. S. Comp. Stat. Supp. 1919, sec. 5249 aa.)

Section 2 of the first Act provided that the Secretary of the Interior " may, in his discretion and upon such conditions as he may deem wise, grant

easements or rights of way for steam, electric, or similar transportation upon or across the park."

Section 3 declared:

> That no lands located within the park boundaries now held in private, municipal, or State ownership shall be affected by or subject to the provisions of this Act.

Section 4 as amended by Act of March 1, 1919 (c. 88, 40 Stat. 1270; U. S. Comp. Stat. Supp. 1919, sec. 5249 d), reads as follows:

> That the said park shall be under the executive control of the Secretary of the Interior, and it shall be the duty of the said executive authority, as soon as practicable, to make and publish such reasonable rules and regulations, not inconsistent with the laws of the United States, as the said authority may deem necessary or proper for the care, protection, management, and improvement of the same, the said regulations being primarily aimed at the freest use of the said park for recreation purposes by the public and for the preservation of the natural conditions and scenic beauties thereof. The said authority may, in his discretion, execute leases to parcels of ground not exceeding twenty acres in extent in any one place to any person or company for not to exceed twenty years whenever such ground is necessary for the erection of establishments for the accommodation of visitors, may grant such other necessary privileges and concessions as he deems wise for the ac-

> commodation of visitors, and may likewise arrange for the removal of such mature or dead or down timber as he may deem necessary and advisable for the protection and improvement of the park. The regulations governing the park shall include provisions for the use of automobiles therein.

The Act of August 25, 1916 (c. 408, 39 Stat. 535, sec. 2; U. S. Comp. Stat. 1916, sec 787 d, e, f), created the National Park Service under the charge of a director, who should—

> under the direction of the Secretary of the Interior, have the supervision, management, and control of the several national parks and national monuments which are now under the jurisdiction of the Department of the Interior, * * * and of such other national parks and reservations of like character as may be hereafter created by Congress * * *.

Section 3, as amended by the Act of June 2, 1920 (c. 218, sec. 5, 41 Stat. 732; U. S. Comp. Stat. Supp. 1923, 787 f), provided that the Secretary of the Interior—

> shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service, and any violation of any of the rules and regulations authorized by this Act shall be punished by a fine of not more than $500 or imprisonment for not exceeding six months, or

> both, and be adjudged to pay all costs of the proceedings. * * * He may also grant privileges, leases, and permits for the use of land for the accommodation of visitors * * * but for periods not exceeding twenty years; and no natural curiosities, wonders, or objects of interest shall be leased, rented, or granted to anyone on such terms as to interfere with free access to them by the public * * *.

Under the authority contained in these Acts, the Secretary of the Interior promulgated, among others, these rules (R. 5):

> 6. Private Operations.—No person, firm, or corporation shall reside permanently, engage in any business, or erect buildings in the park without permission in writing from the Director of the National Park Service, Washington, D. C. Applications for such permission may be addressed to the Director or to the superintendent of the park. Permission to operate a moving-picture camera must be secured from the superintendent of the park.
>
> 18. Fines and Penalties.—Persons who render themselves obnoxious by disorderly conduct or bad behavior shall be subjected to the punishment hereinafter prescribed for violation of the foregoing regulations, or they may be summarily removed from the park by the superintendent and not allowed to return without permission in writing from the Director of the National Park Service or the superintendent of the park.

> Any person who violates any of the foregoing regulations shall be deemed guilty of a misdemeanor and shall be subject to a fine of not more than $500 or imprisonment not exceeding six months, or both, and be adjudged to pay all costs of the proceeding.
>
> 2. Automobiles.—The park is open to automobiles operated for pleasure, but not to those carrying passengers who are paying, either directly or indirectly, for the use of machines. (Excepting, however, automobiles used by transportation lines operating under government franchise.)
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> * * * * *
>
> Careful driving is demanded of all persons using the roads. The government is in no way responsible for any kind of accident.
>
> 16. Fines and Penalties.—Any person who violates any of the foregoing regulations shall be deemed guilty of a misdemeanor and shall be subject to a fine of not more than $500.00 or imprisonment not exceeding 6 months, or both, and be adjudged to pay all costs of the proceedings, and such violation shall subject the offender to immediate ejectment from the park. Persons ejected from the park will not be permitted to return without prior sanction in writing from the Director of the National Park Service or the superintendent of the Park.

The State of Colorado, aggrieved by the enforcement of these rules, brought suit in the United States District Court for Colorado to enjoin the Superintendent of the Park, Roger W. Toll, from

interfering "with the rights of the citizens of the State of Colorado and others to make use of all the public highways as now laid out and established within the confines of the Rocky Mountain National Park." It also sought a decree declaring—

> that Rules 6 and 18 of "General Regulations" and Rules 2 and 16 of "Special Regulations" concerning the use of the said The Rocky Mountain National Park are void * * * and that it be determined that the defendant is without power or right under such regulations, or in any other wise, to prohibit the free use of such highways or to impose, as a condition of their use, the issuance of a permit or imposition of a license fee for so doing.
>
> (R. 10, 11.)

The bill proceeds upon the theory that the Acts of Congress referred to confer no power upon the Secretary of the Interior or the Director of the National Park Service to exclude the public generally from the highways in the park or to prescribe conditions under which those highways may be used; that the asserted right of those officers, of which the regulations complained of are partial evidence, to control the highways is in contravention of the rights of the State to regulate and control traffic over the highways of the State under its police power; and that in any event the regulations are invalid and transcend any authority conferred upon the Secretary of the Interior.

A motion to dismiss the bill was interposed by the defendant, the grounds of which, summarized, are (R. 13, 14):

(*a*) That the United States was a necessary party to the suit, since the questions raised by the bill involved the determination of the ownership of certain portions of the lands within the Park.

(*b*) That the bill sought to enjoin the Superintendent of the Park from performing duties imposed upon him as a government officer by his superiors, the Secretary of the Interior and the Director of the National Park Service.

(*c*) Want of equity.

This motion was sustained and the bill of complaint was dismissed for want of equity (R. 15). Whereupon a direct appeal under section 238 of the Judicial Code was taken to this court.

ARGUMENT

I

The jurisdiction of this court

The bill of complaint clearly discloses that the grievance of the State of Colorado is the enforcement of these regulations promulgated by the Secretary of the Interior and his assertion that the legislation of Congress empowers him to make such regulations for the park. The State asserts that such power is not given and that the regulations therefore are in excess of the authority conferred.

It is plain that the case presents a question of the proper construction of the Acts of Congress

under which the Secretary assumed to act. The assignment of errors is in the main predicated upon the alleged error of the District Court in upholding the regulations as a valid exercise of the power conferred upon the Secretary and not in excess of it.

It is well settled that where the decree appealed from is based upon a construction of a law of the United States a direct appeal to this court will not lie under section 238 of the Judicial Code. *Muse* v. *Arlington Hotel Co.*, 168 U. S. 430; *Spreckels Sugar Refg. Co.* v. *McClain*, 192 U. S. 397; *American Sugar Refg. Co.* v. *United States*, 211 U. S. 155; *Rakes* v. *United States*, 212 U. S. 55; *Shaw* v. *United States*, 212 U. S. 559; *Lamar* v. *United States*, 240 U. S. 60.

But if the case properly presented the constitutional questions urged, we contend that they are so unsubstantial and so wanting in merit as not to support a direct appeal. The constitutional provisions involved are the Fifth and Tenth Amendments, and the State's theory is that while section 4 of the Act grants authority to the Secretary of the Interior to make and establish rules and regulations for the care and management of the park, yet no authority is conferred on him to interfere with or restrict the common use and enjoyment of the public highways within the park, nor could be conferred under the Tenth Amendment, and that the rights of persons holding real estate in private ownership within the

park are expressly excepted from the operation of the Act; notwithstanding the Secretary of the Interior and the Director of the National Park Service assert their right to exclude the public generally from the highways or to prescribe the conditions under which they shall be used, and will continue to forbid persons from operating automobiles for hire on the highways, unless under permit from the park authorities. (Bill, Par. X, R. 8, 9.)

We fail to perceive how the Fifth Amendment has any application here. The State, as we understand it, is not complaining of anything except the regulation of highway traffic and the asserted interference with use of the highways in the park. Its bill of complaint clearly manifests that, and the opening paragraph of its brief (p. 2) confirms that view, for it is there said, speaking of the bill:

> It was charged the Secretary of the Interior and the Director of Park Service asserted full power and authority and control of the use of all such highways, to the exclusion of the lawful jurisdiction and sovereignty of the State of Colorado, and that under such assertions the defendant excludes citizens of the State from making use of such highways.

The particular complaint of the State is the rule that *automobiles for hire* shall not be operated in the park, except those for which permits have issued.

Now, the State of Colorado is not engaged in the business of operating automobiles for hire. There-

fore it is not affected by the regulations. Its only claim is that the regulations exclude it from *control* of its highways in the park. Conceding for the present that the State does own these highways, there is no assertion that they are *appropriated* by the United States or the title of the State divested or its use of them denied. Therefore the State's property is not taken, within the meaning of the Fifth Amendment. *Jacob Ruppert* v. *Caffey*, 251 U. S. 264, 303.

So far as citizens of the State of Colorado are concerned, and assuming that the effect of the regulations is to deprive them of property, the State has no status to invoke the Fifth Amendment on their behalf. Only those whose property is taken or whose rights are directly affected can invoke it. *Hendrick* v. *Maryland*, 235 U. S. 610, 621; *Stearns* v. *Wood*, 236 U. S. 75, 78. The courts will not determine abstract or academic questions. *Texas* v. *Interstate Com. Com'n*, 258 U. S. 158, 162.

Again, in so far as the rights of its citizens are affected, we deny the right of the State to maintain this suit. The legislation which is challenged is that of the Congress of the United States, and as to such legislation the citizens affected are citizens of the United States, and the United States, not the State, is *parens patriae*. *Massachusetts* v. *Mellon*, 262 U. S. 447, 485, 486.

The bill is only maintainable on the proposition that some right of the State in the highways in the

park is involved. *Missouri* v. *Holland*, 252 U. S. 416.

How the Tenth Amendment is applicable is not made clear by the bill or developed in the brief for the State. If the proposition is that no authority such as that asserted by the Secretary of the Interior could be conferred by Congress because not expressly granted to the general government and therefore was a power reserved to the States or to the people, it is only necessary to refer to Art. IV, sec. 3, par 2, of the Constitution by which Congress is authorized to "make all needful rules and regulations respecting the territory or other property belonging to the United States." That Congress may under that authority provide for control of reservations embracing its own lands, is now too well settled to admit of question. *United States* v. *Grimaud*, 220 U. S. 506; *Light* v. *United States*, 220 U. S. 523; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389; *McKelvey* v. *United States*, 260 U. S. 353.

The regulations are designed for the preservation of the park, and any conflict with State regulations is incidental only.

The power of Congress to regulate and control, through an executive officer, the use of the park generally, being beyond question, the fact that the exercise of such authority results in incidental conflict with State control does not invade the reserved powers of the State in conflict with the Tenth Amendment. *Cf. Dayton-Goose Creek Ry. Co.* v.

United States, 263 U. S. 456, 485; *Wisconsin R. R. Com.* v. *C. B. & Q. R. R. Co.,* 257 U. S. 563, 588.

We submit that the basis for the appeal on constitutional questions is wholly insufficient to support a direct appeal.

The mere averment of a constitutional question is not sufficient where the question sought to be submitted is so wanting in merit as to cause it to be frivolous or without any support in reason. It must be more than a mere claim in words. *Farrell* v. *O'Brien,* 199 U. S. 89; *Brolan* v. *United States,* 236 U. S. 216; *Toop* v. *Ulysses Land Co.,* 237 U. S. 580, 583; *Piedmont Power & Light Co.,* v. *Graham,* 253 U. S. 193, 195. We sugggest, however, that the case should not be transferred to the proper Circuit Court of Appeals under the Act of September 14, 1922, c. 305, 42 Stat. 837, since the suit can not be maintained because of absence of a necessary party.

II

The Secretary of the Interior a necessary party

The prime object of this suit is to have a judicial declaration that the rules complained of are void. These rules are promulgated by the Secretary of the Interior, who is particularly authorized by the Acts of Congress cited to make regulations. The defendant, the Superintendent of the Rocky Mountain National Park, is a subordinate of the Secretary; the rules are not his; his duty is to enforce them, and that is imposed by the Secretary. The

bill of complaint recognizes this, for Paragraph III (R. 1) describes the defendant as in control "under the authority of the Secretary of the Interior." Paragraph VIII alleges that the rules are promulgated and "made public by the Secretary of the Interior." (R. 4.) The complaint is of assertion of right by the Secretary to enforce these regulations and to control the use of the roads in the park (R. 5, 6), and that the Secretary of the Interior and the Director of the National Park Service "assert, and will continue to assert, their right, at their sole discretion, to exclude the public generally from such highways," etc. (R. 9); and that "the acts sanctioned and directed by the Secretary of the Interior and the Director of the National Park Service and committed by the defendant are in derogation of and in conflict with the general right of the complainant" (R. 9, 10).

Nothing could be clearer than that this bill frankly is aimed at the Secretary of the Interior. His authority under the applicable laws is challenged; his rules are attacked, and he it is whose hands would be tied by the injunction and decree sought by the State. Notwithstanding all this, he is not made a party or afforded an opportunity to defend his authority and his rules and regulations.

That he is a necessary party, and that the suit can not properly be entertained in his absence, is established by *Warner Valley Stock Co.* v. *Smith,* 165 U. S. 28; *Gnerich* v. *Rutter,* 265 U. S. 388; *Webster* v. *Fall,* 266 U. S. 507.

We submit that the District Court should have dismissed the bill upon this ground, and conformably to the procedure followed in the cited cases, the decree should be reversed and the case remanded with instructions to that court to dismiss the bill on that ground. We suggest, however, that costs should not be awarded against the appellee.

III

The regulations are consistent with and not in excess of the power granted by the acts of Congress, are appropriate to the purposes for which the park was created, and are reasonable

We renew the suggestion already made that the State is not in a position to question the validity of these regulations in so far as vested or property rights are concerned, and that only those affected by them are entitled to object to them. But we do not need or wish to rest solely upon that ground.

In order that the court may have all the regulations before it we have printed them as an appendix to this brief.

The first regulation attacked is:

> 6. *Private operations.*—No person, firm, or corporation shall reside permanently, engage in any business, or erect buildings in the park without permission in writing from the Director of the National Park Service, Washington, D. C. Applications for such permission may be addressed to the Director or to the superintendent of the park. Permission to operate a moving-picture camera

must be secured from the superintendent of the park.

It is said that this regulation deprives those owning property within the park of their vested rights therein in violation of section 3 of the Act creating the park, which declares that no lands within the park held in private ownership shall be affected by or subject to the provisions of the Act.

But this regulation has no application to privately owned lands and has not been construed to have such application by the park authorities. It relates to lands of the United States. This is evidenced by Regulation 10:

> *Patented lands.*—Owners of patented lands within the park limits are entitled to the full use and enjoyment thereof; the boundaries of such lands, however, shall be determined, and marked and defined, so that they may be readily distinguished from the park lands. While no limitations or conditions are imposed upon the use of private lands so long as such use does not interfere with or injure the park, private owners shall provide against trespass by their livestock upon the park lands, and all trespasses committed will be punished to the full extent of the law. Stock may be taken over the park lands to patented private lands with the written permission and under the supervision of the superintendent, but such permission and supervision are not required when access to such private lands is had

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> wholly over roads or lands not owned or controlled by the United States.

Moreover, it clearly does not relate to the matter of traffic regulation or control of operation of automobiles on highways in the park, which is the gist of this case. This is indicated by the fact that the Automobile Regulations are under a separate head. Furthermore, there is no allegation that the State owns any lands in the park. Its claim of ownership is of the highway.

Regulation 2 of the Automobile and Motorcycle Regulations, about which the State attack centers, reads thus:

> *Automobiles.*—The park is open to automobiles operated for pleasure, but not to those carrying passengers who are paying, either directly or indirectly, for the use of machines. (Excepting, however, automobiles used by transportation lines operating under government franchise.)

As we have already pointed out, this regulation does not affect the State. It is not in the business of transportation for hire. Neither does this regulation prohibit the free use of the highways of the park to all except those operating automobiles for hire.

Now, it is true that a citizen may have a right to travel and to transport his property over the public highways by auto vehicle. *Buck* v. *Kuykendall*, decided March 2, 1925. This right is not taken away by the regulations, but is expressly recognized not

only by Regulation 2 but by Regulations 6 and 7. These last two are as follows:

> 6. *Permits.*—Until further notice no permits for automobiles or motor cycles operated for pleasure will be required.
>
> 7. *Fees.*—No fee is demanded for the operation of automobiles or motor cycles operated for pleasure.

Thus, except as to auto vehicles operated for hire, these regulations do not conflict with the authority of the State of Colorado at all.

Now, a citizen has no right to make the highways his place of business by using them as a common carrier for hire. This is a privilege that the State may or may not grant, in its discretion. *Buck* v. *Kuykendall, supra.* It is not averred in the bill of complaint that those who have been denied the privilege of operating autos for hire in the park have received a license from the State to carry on such a business; but that is left to inference. The State could withhold a license to carry on business on its highways, or revoke one given, and this would not violate the Fourteenth Amendment. If, therefore, the State in the exercise of its police power may deny this privilege, then the United States may for a permitted purpose do likewise without compensation, and consistently with the Fifth Amendment. *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 156, 157.

We then come to the question whether the regulations are consistent with the law and whether the

law enacted was within the authority of Congress for a permitted purpose.

The power vested in Congress by the Constitution to make all needful rules and regulations respecting the territory or other property of the United States, Art. IV, section 3, paragraph 2, vests in the government a police power over its own property akin to that exercised by the States in their respective spheres. The admission of a State into the Union does not deprive the federal government of the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is known as the police power, so long as such power is directed solely to its own protection. A different rule would place the public domain of the United States completely at the mercy of State legislation. *Camfield* v. *United States,* 167 U. S. 518, 525, 526.

This power of Congress is exclusive, and while for many purposes a State has civil and criminal jurisdiction over lands within its limits belonging to the United States, this jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use, and prescribe in what manner others may acquire rights in them. From the earliest times Congress has regulated in many particulars the use by others of lands of the United States, ***has prohibited and made punishable various acts calculated to be injurious to them or to prevent***

their use in the way intended, and has provided for and controlled the acquisition of rights of way over them for highways, railroads, canals, ditches, telegraph lines, and the like. The States have almost uniformly accepted this legislation as controlling, and where it has been challenged its validity has been upheld and its supremacy over State enactments sustained. *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 404, 405.

The States may prescribe police regulations applicable to public-land areas, so long as the regulations are not arbitrary *or inconsistent with applicable congressional enactments. McKelvey* v. *United States,* 260 U. S. 353, 359.

It is indisputable that the authority of the United States is paramount when exerted as to subjects concerning which it has the power to control. Therefore, although authority to regulate within a given sphere may exist in both the United States and in the States, when the former calls into play its constitutional authority the effect is, as to conflicts with the State authority, to limit the latter since the paramount power necessarily controls the subordinate. To limit it by the State power would be to deny the existence of the supreme power. *Northern Pac. Ry. Co.* v. *North Dakota,* 250 U. S. 135, 150.

Now, the greater part of the lands within the boundaries of the Rocky Mountain National Park are lands of the United States. The highways as to which the State is here asserting title and right

of control cross these government lands. The utmost property right in these highways which the State can claim is an easement, for the grant made by section 2477, R. S., is of a "right of way for the construction of highways over public lands, not reserved for public uses."

The power given the Secretary of the Interior by the Act creating the park was to make and publish such regulations as he might deem necessary or proper "for the care, protection, management, and improvement of the same." Congress expressly declared the purpose of the regulations to be "primarily aimed at the freest use of the said park for recreation purposes by the public and for the preservation of the natural conditions and scenic beauties thereof." Particularly, it was provided that the regulations should make provision for the use of automobiles in the park.

To assert that Congress *did* not intend to grant authority over automobile traffic is to dispute the plain language of the statute. To contend that Congress *could* not grant such power, or through the Secretary of the Interior exercise control of traffic over roads on its lands within the park, is to deny the force and effect of the cited decisions of this court.

The policy of reserving and preserving objects and areas of scientific and scenic interest for the benefit and enjoyment of all the people of the United States is now well established. *Cameron* v. *United States*, 252 U. S. 450, 455. It is analogous

to the National Forest policy, and the establishment of each policy is but the exertion of the same power of the federal government.

The power to regulate use and occupancy of National Forest lands has been fully sustained in the face of asserted conflict with State power, authority, and jurisdiction. *United States* v. *Grimaud*, 220 U. S. 506; *Light* v. *United States*, 220 U. S. 523; *Utah Power & Light Co.* v. *United States, supra.*

There is an additional ground upon which the jurisdiction of the United States over the highways in the park may be maintained. It is upon cession of jurisdiction by the State authorties to the federal authorities. This does not appear in the record, but is referred to and dealt with in the decision of the Eighth Circuit Court of Appeals in *Robbins* v. *United States*, 284 Fed. 39. That case involved practically the same questions raised in this case as to validity of the regulations governing this very park. From the statement of the *Robbins case* (p. 42) it appears that by a resolution dated August 13, 1919, the Colorado State Highway Commission did thereby—

> relinquish, release, and transfer unto the United States government, and to the department thereof having control of the National Park and the highways therein, the control, management, maintenance, and supervision now exercised by said Highway Commission of the public highways located and situated within the boundaries of Rocky

> Mountain National Park, in the state of Colorado, with the exception, however, of what is known and designated as the Fall River road, which is now in process of construction, and shall be completed by said State Highway Commission; and upon completion thereof, the maintenance, control and supervision of said excepted road shall pass to the United States government, as in this resolution provided.

This was executed in the name of the Highway Commission by its chairman and secretary and approved by the Governor of the State, attested by the Secretary of State.

A resolution in almost identical language, dated August 7, 1919, was executed by the Board of County Commissioners of Larimer County.

Speaking of these resolutions and their effect, the Circuit Court of Appeals said (p. 45):

> It appears by the laws of Colorado, found in chapter 78, art. 2, § 5, Acts of 1917, the State Highway Commission was given power to make agreements in behalf of the state with the government, in any manner affecting the public highways of the state, and further by the Revised Statutes of Colorado 1908, §§ 6900, 6901, the consent of the state was given to the United States to acquire any land in the state for any purpose of the government. The state laws also authorized a board of county commissioners to lay out, alter, or discontinue any road running into or through any county, to represent the

> county and have care of the county property, and the management of its business and concerns. Rev. Stat. Colo. 1908, § 1204. The resolution of the State Highway Commission, sanctioned by the county board of Larimer county, was sufficient to cede or transfer through legislative agency, to the government, such jurisdiction and control as the state possessed over the highways in this park as therein described.
>
> The noncompletion of the Fall River road is emphasized, as the resolutions withheld transfer of it meantime. The purpose was manifest that it should pass to the government except that temporarily the state was left free to improve it.

In the brief for the State (p. 59 *et seq.*) the *Robbins case* is discussed at some length, and an attempt is made to avoid its effect.

As to the resolutions ceding control the State urges that, as they are not in the record in this case, the court can not give consideration to them, but we submit that the reported decision in the *Robbins case* can be judicially noticed.

It is also said that had this case gone to issue on the merits, the State would have contended that the resolutions were in excess of the authority of the respective Boards. An attempt is made to demonstrate that these Boards, particularly the State Highway Commission, could not legally cede control of the highways in the park. But in view of the provision of the Highway Law of 1917, c. 78,

sec. 5, par. 11, cited by the Court of Appeals in the *Robbins case,* and which authorized agreements with the United States, we feel justified in saying that the action which the State officials took was within their authority.

The State calls attention to chapter 35 of the Laws of 1921 which repealed the 1917 act and which contained a provision authorizing agreements with the United States government " for the construction or maintenance of State Highways " (c. 136, sec. 14, par. 8). It is said that this is a legislative construction of section 5, par. 11, of the 1917 act and shows what was intended by the latter.

We answer that it is novel to assert that a repealing Act is an aid in the interpretation of the Act repealed. Further, that in the paragraph of the 1917 act (sec. 5, par. 12), immediately following the paragraph authorizing agreement with the United States government, was a provision authorizing agreement with any county, city, or town of the State for " improvement and maintenance." The difference in the two paragraphs is significant. Again, the State officials executing the cession must have construed the 1917 Act as authorizing them to do so, and finally, the cession was made in 1919, and the change in the law in 1921 could not affect it if valid when made.

But, while we think these cessions binding, yet we prefer the fundamental ground upon which the Court of Appeals in the *Robbins case* based its decision, thus (p. 45):

> But we are of the opinion that the power of the government to regulate the traffic on those highways, as it has done by congressional enactment and rules thereby authorized, rests on the secure footing that it is a valid exercise of control over the property of the government, even though it is of the nature of police power, and that it is sustained by section 3, article 4, of the federal Constitution, which entitles the government to make all needful regulations respecting its territory and property.

So far as the validity of the regulations is concerned, we submit that the reading of them will bring the conviction that they are not harsh, drastic, or arbitrary, but are reasonable and unoppressive.

Many considerations could be urged in support of Rule 2 prohibiting the operation of autos for hire except upon permit. Primarily, it is in the interest of the public generally that responsible parties operate in the park; this is a protection to the public in case of accidents, injuries or losses. It insures good and adequate service and reasonable charges. We stress the matter of adequate service—during the peak of the tourist season many automobile operators are very desirous of securing the cream of the business, but during the off seasons are not particular about maintaining service. A permanent service is desirable, and it is not unreasonable to require as a condition to a permit to operate, the maintenance of continuous service.

There can be no objection to Regulations 16 and 18, which prescribe fines and penalties for violation of the rules. The law, not the Secretary, makes the infraction of the rules a misdemeanor, and it is not an improper delegation of authority to an executive officer. In *United States* v. *Grimaud*, 220 U. S. 506, a like contention was made with respect to penalties for violation of regulations of the Secretary of Agriculture respecting National Forests, but was rejected. That case is controlling here on this point. *Avent* v. *United States*, 266 U. S. 127, 131.

The test of regulations promulgated by an executive officer under a law authorizing the making of regulations is that they be reasonable, appropriate, not arbitrary or inconsistent with the law. *United States* v. *Morehead*, 243 U. S. 607; *La Motte* v. *United States*, 254 U. S. 570. The authority of the officers is not to be narrowly defined, and only those regulations are objectionable which are unauthorized, or beyond the power of Congress to authorize, not those the wisdom of which is questioned. *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 410. The regulations, when subjected to these tests, are, we submit, valid and well within the power of the Secretary of the Interior.

We need not suggest the evils which would develop if the federal authorities were hampered by State restrictions and control. If the State could object to one regulation governing the park it could object to all. It might prescribe regulations

entirely unsuited to the park and permit operations detrimental to the park and the safety and welfare of the visitors. Surely it is the duty of the United States to protect those who at its invitation visit the park.

We respectfully submit that on the merits the decree of the District Court dismissing the bill should be affirmed.

JAMES M. BECK,
Solicitor General.
IRA K. WELLS,
Assistant Attorney General.
H. L. UNDERWOOD,
Special Assistant to the Attorney General.
APRIL, 1925.

APPENDIX

RULES AND REGULATIONS

(Approved December 4, 1922, to continue in force and effect until otherwise directed by the Secretary of the Interior)

GENERAL REGULATIONS

The following rules and regulations for the government of Rocky Mountain National Park are hereby established and made public pursuant to authority conferred by the act of Congress approved January 26, 1915 (38 Stat. 798), as amended February 14, 1917 (39 Stat. 916), and the act of August 25, 1916 (39 Stat. 536), as amended June 2, 1920 (41 Stat. 732).

1. *Preservation of natural features and curiosities.*—The destruction, injury, defacement, or disturbance in any way of the public buildings, signs, equipment, or other property, or the trees, flowers, vegetation, rocks, mineral, animal, or bird, or other life is prohibited: *Provided,* That flowers may be gathered in small quantities when, in the judgment of the superintendent, their removal will not impair the beauty of the park.

2. *Camping.*—In order to preserve the natural scenery of the park and to provide pure water and facilities for keeping the park clean, permanent camp sites have been set apart for tourists visiting the park in their own conveyances, and no camping is permitted outside the specially designated sites. These camps have been used during past sea-

sons; they will be used daily this year and for many years to come. It is necessary, therefore, that the following rules be strictly enforced for the protection of the health and comfort of the tourists who visit the park in their own conveyances:

(*a*) Combustible rubbish shall be burned on camp fires and all other garbage and refuse of all kinds shall be placed in garbage cans or, if cans are not available, placed in the pits provided at the edge of camp. At new or unfrequented camps garbage shall be burned or carried to a place hidden from sight. *Keep the camp grounds clean.*

(*b*) There are thousands of visitors every year to each camp site and the water in the creeks and streams adjacent is not safe to drink. The water supply provided is pure and wholesome and must be used. If, however, the water supply is not piped to grounds, consult rangers for sources to use. Tourists out on hiking parties must not contaminate watersheds of water supplies. They are indicated by signs, pipe lines, and dams. *There is plenty of pure water; be sure you get it.*

(*c*) Campers and others shall not wash clothing or cooking utensils or pollute in any other manner the waters of the park, or bathe in any of the streams near the regularly traveled thoroughfares in the park without suitable bathing clothes.

(*d*) Stock shall not be tied so as to permit their entering any of the streams of the park. All animals shall be kept a sufficient distance from camping grounds, in order not to litter the ground and make unfit for use the area which may be used later as tent sites.

(*e*) Wood for fuel only can be taken from dead or fallen trees.

3. *Fires.*—Fires constitute one of the greatest perils to the park; they shall not be kindled near trees, dead wood, moss, dry leaves, forest mold, or other vegetable refuse, but in some open space on rocks or earth. Should camp be made in a locality where no such open space exists or is provided, the dead wood, moss, dry leaves, etc., shall be scraped away to the rock or earth over an area considerably larger than that required for the fire.

Fires shall be lighted only when necessary, and when no longer needed shall be completely extinguished, and all embers and bed smothered with earth or water, so that there remains no possibility of reignition.

The possession of, the ignition or setting off of firecrackers or fireworks is prohibited within the park.

Especial care shall be taken that no lighted match, cigar, or cigarette is dropped in any grass, twigs, leaves, or tree mold.

4. *Hunting.*—The park is a sanctuary for wild life of every sort, and hunting, killing, wounding, capturing, or frightening any bird or wild animal in the park, except dangerous animals when it is necessary to prevent them from destroying life or inflicting injury, is prohibited.

The outfits, including guns, traps, teams, horses, or means of transportation used by persons engaged in hunting, killing, trapping, ensnaring, or capturing birds or wild animals, or in possession of game killed on the park lands under circumstances other than prescribed above, shall be taken up by the superintendent and held subject to the order of the Director of the National Park Service, except in cases where it is shown by satisfac-

tory evidence that the outfit is not the property of the person or persons violating this regulation, and the actual owner was not a party to such violation. Firearms are prohibited in the park except on written permission of the superintendent. Visitors entering or traveling through the park to places beyond shall, at entrance, report and surrender all firearms, traps, nets, seines, or explosives in their possession to the first park officer, and in proper cases may obtain his written leave to carry them through the park sealed. The Government assumes no responsibilities for loss or damage to any firearms, traps, nets, seines, or other property so surrendered to any park officer, nor are park officers authorized to accept the responsibility of custody of any property for the convenience of visitors.

5. *Fishing.*—Fishing with nets, seines, traps, or by the use of drugs or explosives, or in any other way than with hook and line, or for merchandise or profit, is prohibited. Fishing in particular water may be suspended, or the number of fish that may be taken by one person in any one day from the various streams or lakes may be regulated by the superintendent. All fish hooked less than 7 inches long shall be carefully handled with moist hands and returned at once to the water. Fish retained shall be killed. Thirty fish (not exceeding a total of 10 pounds) shall constitute the limit for a day's catch.

6. *Private operations.*—No person, firm, or corporation shall reside permanently, engage in any business, or erect buildings in the park without permission in writing from the Director of the

National Park Service, Washington, D. C. Applications for such permission may be addressed to the Director or to the superintendent of the park. Permission to operate a moving-picture camera must be secured from the superintendent of the park.

7. *Gambling.*—Gambling in any form, or the operation of gambling devices, whether for merchandise or otherwise, is prohibited.

8. *Advertisements.*—Private notices or advertisements shall not be posted or displayed within the park, excepting such as the park superintendent deems necessary for the convenience and guidance of the public.

9. *Mining claims.*—The location of mining claims is prohibited on Government lands within the park.

10. *Patented lands.*—Owners of patented lands within the park limits are entitled to the full use and enjoyment theeof; the boundaries of such lands, however, shall be determined, and marked and defined, so that they may be readily distinguished from the park lands. While no limitations or conditions are imposed upon the use of private lands so long as such use does not interfere with or injure the park, private owners shall provide against trespass by their livestock upon the park lands, and all trespasses committed will be punished to the full extent of the law. Stock may be taken over the park lands to patented private lands with the written permission and under the supervision of the superintendent, but such permission and supervision are not required when access to such private lands is had wholly over roads or lands not owned or controlled by the United States.

11. *Grazing.*—The running at large, herding, or grazing of livestock of any kind on the Government lands in the park, as well as the driving of livestock over same, is prohibited except where authority therefor has been granted by the superintendent. Livestock found improperly on the park lands may be impounded and held until claimed by the owner and trespass adjusted.

12. *Authorized operators.*—All persons, firms, or corporations holding franchises in the park shall keep the grounds used by them properly policed and shall maintain the premises in a sanitary condition to the satisfaction of the superintendent. No operator shall retain in his employment a person whose presence in the park may be deemed by the superintendent subversive of good order and management of the park.

All operators shall require each of their employees to wear a metal badge with a number thereon, or other mark of identification, the name and the number corresponding therewith or the identification mark being registered in the superintendent's office. These badges must be worn in plain sight on the hat or cap.

13. *Dogs and cats.*—Cats are not permitted on the Government lands in the park and dogs only to those persons passing through the park to the territory beyond, in which instances they shall be kept tied while crossing the park.

14. *Dead animals.*—All domestic or grazed animals that may die on the Government lands in the park, at any tourist camp, or along any of the public thoroughfares shall be buried immediately by the owner or person having charge of such animals at least 2 feet beneath the ground and in no

trances, viz, eastern or Estes Park entrance, southeastern or Longs Peak entrance, and the western or Grand Lake entrance.

2. *Automobiles.*—The park is open to automobiles operated for pleasure, but not to those carrying passengers who are paying, either directly or indirectly, for the use of machines (excepting, however, automobiles used by transportation lines operating under Government franchise), and any person operating an automobile in contravention of the provisions of this regulation will be deemed guilty of its violation.

Careful driving is demanded of all persons using the roads. The Government is in no way responsible for any kind of accident.

3. *Motorcycles.*—Motorcycles are admitted to the park under the same conditions as automobiles and are subject to the same regulations, as far as they are applicable. Automobiles and horse-drawn vehicles shall have the right of way over motorcycles.

4. *Motor trucks.*—Motor trucks may enter the park subject to the weight limitations prescribed by the Director of the National Park Service.

5. *Intoxication.*—No person who is under the influence of intoxicating liquor and no person who is addicted to the use of narcotic drugs shall operate or drive a motor vehicle of any kind on the park roads.

6. *Permits.*—Until further notice no permits for automobiles or motorcycles operated for pleasure will be required.

7. *Fees.*—No fee is demanded for the operation of automobiles or motor cycles operated for pleasure.

8. *Distance apart; gears and brakes.*—Automobiles while in motion shall be not less than 50 yards apart, except for the purpose of passing, which is permissible only on comparatively level stretches of roads or on slight grades. All automobiles, except while shifting gears, shall retain their gears constantly enmeshed. The driver of each automobile may be required to satisfy park officers that all parts of his machine, particularly the brakes and tires, are in first-class working order and capable of making the trip; and that there is sufficient gasoline in the tank to reach the next place where it may be obtained. The automobile shall carry at least one extra tire. Motorcycles not equipped with brakes in good working order are not permitted to enter the park.

9. *Speeds.*—Speed is limited to 12 miles per hour on grades and when rounding sharp curves. On straight open stretches when no vehicle is nearer than 200 yards the speed may be increased to 20 miles per hour.

10. *Horns.*—The horn shall be sounded on approaching curves or stretches of road concealed for any considerable distance by slopes, overhanging trees, or other obstacles, and before meeting or passing other automobiles, motorcycles, riding or driving animals, or pedestrians.

11. *Lights.*—All automobiles shall be equipped with head and tail lights, the headlights to be of sufficient brilliancy to insure safety in driving at night, and all lights shall be kept lighted after sunset when automobile is on the roads. Headlights shall be dimmed when meeting other automobiles, motorcycles, riding or driving animals, or pedestrians.

12. *Muffler cut-outs.*—Muffler cut-outs shall be kept closed while approaching or passing riding horses, horse-drawn vehicles, hotels, camps, or checking stations.

13. *Teams.*—When teams, saddle horses, or pack trains approach, automobiles shall take the outer edge of the roadway, regardless of the direction in which they may be going, taking care that sufficient room is left on the inside for the passage of vehicles and animals. Teams have the right of way, and automobiles shall be backed or otherwise handled as may be necessary so as to enable teams to pass with safety. In no case shall automobiles pass animals on the road at a speed greater than 8 miles per hour.

14. *Overtaking vehicles.*—Any vehicle traveling slowly upon any of the park roads shall, when overtaken by a faster moving motor vehicle and upon suitable signal from such overtaking vehicle, give way to the right, in case of horse-drawn vehicles, allowing the overtaking vehicle reasonably free passage, provided the overtaking vehicle does not exceed the speed limits specified for the road in question.

When automobiles going in opposite directions meet on a grade, the ascending machine has right of way, and the descending machine shall be backed or otherwise handled as may be necessary to enable the ascending machine to pass with safety.

15. *Accidents, stop-overs.*—If, because of accident or stop for any reason, automobiles are unable to keep going, they shall be immediately parked off the road, or, where this is impossible, on the outer edge of the road.

16. *Fines and penalties.*—Any person who violates any of the foregoing regulations shall be deemed guilty of a misdemeanor and shall be subject to a fine of not more than $500 or imprisonment not exceeding 6 months, or both, and be adjudged to pay all costs of the proceedings, and such violation shall subject the offender to immediate ejectment from the park. Persons ejected from the park will not be permitted to return without prior sanction in writing from the Director of the National Park Service or the superintendent of the park.

17. *Reduced engine power, gasoline, etc.*—Due to the high altitude of the park roads, ranging as high as 11,800 feet, the power of all automobiles is much reduced. A leaner mixture of gasoline and air is required, but on acccount of reduced engine power about 50 per cent more gasoline will be used per mile than is required at lower altitudes. Likewise one gear lower will generally have to be used on grades than would have to be used in other places. A further effect that must be watched is the heating of the engine on long grades, which may become serious unless care is used.

18. *Garages—Repairs—Supplies.*—Gasoline, oils, and accessories are available for purchase at stations in Estes Park and Grand Lake. Repair shops and garages are maintained at these points by dealers not under the jurisdiction of the National Park Service.

19. The foregoing regulations do not apply to motor traffic in the section of the Allen's Park-Estes Park road that lies within the boundary of the park.

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